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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

To: The Commission

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PETITION FOR RECONSIDERATION

CelSMeR and CMH, Inc. ("CMH"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby requests reconsideration of the Third Order on Reconsideration, FCC 95-429, released October 20, 1995, 60 Fed. Reg. 55,484 (November 1, 1995) ("Third Recon Order"), in the above-captioned rulemaking proceeding. The Third Recon Order prohibits MTA licensees from using "resale" agreements with incumbent 900 MHz SMR operators in meeting their three and five year coverage requirements. This Third Recon Order reverses *sua sponte* the Commission's decision in the Second Order on Reconsideration and Seventh Report and Order, FCC 95-395, released September 14, 1995, 60 Fed. Reg. 48,913 (September 21, 1995) ("Second Recon Order"), without undertaking a new rulemaking and in total disregard of the record evidence developed in this proceeding in comments submitted prior to the adoption of the Second Recon Order.

I. The Prohibition on Use of Resale Agreements Is Not a "Clarification" and Cannot Be Implemented Without a Whole New Rulemaking Proceeding.

In the Second Recon Order, the Commission stated its expectation that "...bidders have a realistic plan for meeting coverage requirements by investigating the possibility of resale." Second Recon Order, *supra*, at ¶ 32. The Commission admonished bidders concerned with not being able to reach agreements with incumbent licensees to take that fact into consideration when preparing their bidding strategies, and encouraged future MTA licensees to negotiate with incumbents to avoid turning the 900 MHz SMR auction into an unserved area auction. *Id.* As the Commission correctly reasoned, an "unserved area" auction would be at odds with the existing policy of the 900 MHz SMR service to provide system users with ubiquitous regional coverage. *Id.*

The Commission previously concluded, in this proceeding, that encouraging MTA licensees to satisfy their construction benchmarks by working with incumbents was in the public interest. With incumbents and MTA licensees being encouraged to negotiate resale agreements to their mutual benefit, there is little motivation for MTA licensees to warehouse their spectrum for anti-competitive reasons. *See* Second Report and Order and Second Further Notice of Proposed Rule Making, PR Docket No. 89-553, 10 FCC Rcd 6884, 77 RR2d 960 (1995) ("Second R&O and Second NPRM"). In the Second R&O and Second NPRM, which preceded the Second Recon Order, the Commission specifically stated:

> [W]hen a licensee acquires an MTA license, it must assume the responsibility of obtaining the right to use sufficient frequency to provide coverage if the spectrum is not already available. This responsibility may be achieved directly ... or indirectly (through resale or other leasing agreements with incumbents). Thus, an MTA licensee must satisfy its coverage requirements regardless of the extent of the presence of incumbents within its MTA block. We believe that this will also serve to discourage applicants who have a limited ability to provide coverage within an MTA from seeking MTA licenses for anti-competitive reasons, *e.g.*, to block potential acquisition of the MTA license by an applicant who already provides substantial service in the MTA.

Second R&O and Second NPRM, *supra*, at ¶ 42 (emphasis added). The highlighted language has one and only one plain meaning - - the MTA licensee can resell off incumbents' base stations to meet its coverage requirements. An incumbent has no coverage requirements, and if an incumbent was to resell off an MTA licensee's base station, that agreement would be irrelevant to the MTA licensee's coverage area. Therefore, the highlighted language could not possibly refer to an incumbent reselling off an MTA licensee's base station.

In the Second Recon Order, the Commission specifically reaffirmed that MTA licensees could meet their coverage requirements via resale or management agreements, stating:

> "...MTA licensees may use options such as resale or management agreements[1] to fulfill the coverage requirements."
>
> [1] Management agreements should not result in a *de facto* transfer of control. [Citation omitted.]

As with the previously quoted text, this quotation is plain and unambiguous.

In the Third Recon Order, the Commission completely reverses its prior decisions. In one of the greatest examples of "Double Think" since George Orwell wrote the novel "1984," the Commission states:

> We also stated, in the [Second Recon Order], that bidders could investigate the possibility of resale in order to develop a realistic plan for meeting the coverage requirements. To eliminate any possible ambiguity, we clarify that this statement refers to agreements by 900 MHz MTA licensees to resell their facilities to others. It does not, however, allow such licensees to meet their coverage requirements by obtaining resale from another facilities-based provider, e.g. an incumbent 900 MHz licensee.

Third Recon Order, *supra*, at ¶ 3 (emphasis added). The emphasized wording is a blatant falsehood, and if the Court of Appeals reads all three of the above quotes, the Court will readily so conclude.

Given that the Commission cannot rationally justify its total policy reversal as a "clarification" of pre-existing policy, and given that the Commission acted *sua sponte*, not in response to any timely-filed reconsideration petition on this issue, the Commission lacked the statutory power under either the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §§ 151 *et seq.*, or the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, to have reversed its policy on the use of resale agreements. In fact, Section 553 of the APA, 5 U.S.C. § 553, specifically prohibits agencies such as the FCC from changing or reversing *in toto* its substantive rules and policies without first initiating a new rulemaking proceeding.

II. Even if, *Arguendo*, the Commission Had the Power to Reverse its Position on the Use of Resale Agreements, to Do So Is Against Public Policy.

Prohibiting 900 MHz MTA licensees from using resale agreements with incumbent licensees to meet construction benchmarks will irreparably harm those MTA bidders, such as CelSMeR, who operate incumbent networks through management or resale agreements, and those MTA bidders, such as CMH, whose owners are incumbent licensees that banded together to bid. In either event, the Commission is harming incumbent operators who have invested substantial sums of money in the development of their systems and presently serve tens of thousands of customers.

The Commission's rationale for its sudden change in policy is flawed. In the Third Recon Order, the Commission concluded that broadband PCS and 900 MHz are similar services and therefore 900 MHz MTA licensees must, like PCS licensees, meet coverage requirements without using resale agreements. While PCS and 900 MHz services may both be available for use as CMRS, that is where the similarity ends. Notably, there are no incumbent PCS licensees already providing co-channel service in the markets that PCS auction winners must serve. Therefore, PCS licensees could not provide coverage by reselling off incumbent base stations even if it were allowed.

In contrast, there are already 900 MHz incumbent licensees providing co-channel service in the same areas that 900 MHz MTA licensees are required to serve to meet Commission prescribed construction benchmarks. Moreover, unlike PCS, where there are no

geographic areas in which construction is precluded, MTA licensees are prohibited from doing their own construction in precisely those geographic areas where resale and management agreements would be employed.

Additionally, this sudden arbitrary change in Commission policy will undermine the Commission's stated goal of establishing a ubiquitous regional 900 MHz SMR service. If MTA licensees are forced to implement specially polarized or other exotic technical innovations to partially overlap incumbents' areas without interference, the result will be incompatible neighboring co-channel systems whose customers cannot roam within the entire MTA.

III. Conclusion.

The established rule was clear and unambiguous. The Commission, despite its contrary claim, did not "clarify" anything, but merely reversed an existing, unambiguous rule. Under the APA, agencies cannot reverse existing rules except by instituting and completing a new rulemaking proceeding. This Commission is no exception and is bound by the APA. The Commission's original rule allowing MTA licensees to meet their coverage requirements via resale or management agreements was sound. It fostered cooperation among incumbent licensees and MTA licensees.

WHEREFORE, CelSMeR and CMH respectfully request that the Commission reconsider and rescind the new policy it adopted in the Third Recon Order, and continue to allow MTA licensees to use resale or management agreements with incumbents to meet their construction benchmarks.

Respectfully submitted,

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December 1, 1995

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CERTIFICATE OF SERVICE

I, Melissa L. Clement, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Petition for Reconsideration**" to be hand delivered, this 1st day of December, 1995 to each of the following:

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